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No. 95-923

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

SECURITY MANAGEMENT CORP.,
PETITIONER,

V.

BALTIMORE COUNTY, MARYLAND, *ET AL,*
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a County Council's discretionary decision to reject a rezoning request seeking the highest density development possible for a property adjacent to the primary watershed for a metropolitan area, when reasonable, less drastic residential development and other uses may occur under long-standing zoning, violate the Takings Clause of the Fifth Amendment of the United States Constitution?

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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

Baltimore County, Maryland (the "County") and the People's Counsel of Baltimore County respectfully request that this Court deny the Petition for Writ of Certiorari (Petition) of Security Management Corp. ("Security") seeking review of the decision of the Court of Special Appeals of Maryland. That decision is consistent with the decisions of this Court and other state courts. The Petition fails to allege the existence of any conflict among lower court decisions nor does it fairly present the material facts concerning this case. No compelling justification has been proffered which would warrant the consideration of this limited impact case by this Court.

STATEMENT OF THE CASE

The County submits the following Statement of the Case to supplement that presented by Security and to clarify several inaccuracies and/or omissions. It is significant that the Complaint filed by Security (Petition, dd-pp), fails to reveal several "facts" Security has included in its Statement of the Case. Therefore, bearing in mind this case was disposed of at the trial level on a Motion to Dismiss where all well-pled facts would have been considered accurate pursuant to *Baker, Watts & Co. v. Miles & Stockbridge*, 95 Md. App. 145 (1993), the consideration of the Petition must be confined to the facts as well-pled below and considered by the lower court.

Initially, it must be understood that the 215 acre parcel, which is the subject of this case, did not stand alone, but is the remainder of a larger 391 acre tract known as the "Towson Nursery parcel" which was also controlled by Security and which has been developed under higher density zoning regulation. *See* paragraph 2 of Complaint (Petition, ee). This remainder of the original 391 acre tract would seem to be included under what was referred to as "other adjacent landowners,"(Petition, p. 3) and this developed property and the other adjacent properties referenced are all located further away from the protected watershed.

Security has designated the subject locale of its proposed development as "Hunt Valley." This is somewhat misleading and, in the context of this case, significant as this developer attempts to ignore the most important geographical

aspect of this case, as stated in the first sentence of the opinion of the Court of Special Appeals of Maryland: ". . .Appellant is upset that its property, located in the Loch Raven watershed in Baltimore County is included in the county's RC-4 resource conservation zone. . . "(Petition, j). The Complaint is more accurate in this regard, in that it refers to the property as "west of the Loch Raven Reservoir, near Hunt Valley, Maryland."(Petition, dd). The Maryland appellate court discussed the seemingly obvious importance of conserving watersheds and limiting development in those areas as a legitimate legislative judgment call. (Petition, r).

Further, as conceded by counsel in oral argument before the Court of Special Appeals of Maryland, and despite the assertion in the Statement of the Case, Security did not allege in its Complaint the nature of the zoning for the subject parcel prior to the RC-4 designation in 1976. Therefore, when the trial court dismissed this claim, it did not have before it any allegation as to the nature of the pre-1976 zoning. Paragraphs 7 and 8 of the Complaint (Petition, ee) seemed to indicate that Security did not acquire the subject parcel until sometime during or after 1979. The operative date for any alleged restrictive zoning is 1976.

Security also states that the property was originally purchased because it was "zoned to accommodate such a [high density] residential subdivision" (Petition, p. 2). Absolutely no such allegation was presented in the Complaint. As the Maryland intermediate appellate court observed, ". . .we need

to look at, and confine ourselves to, the allegations in the complaint. They are sparse, indeed." (Petition, p).

Security unfortunately has gone far outside the record of this case and made bald assertions in this court which are totally unsupported, such as: 1) the property was originally purchased because it was zoned to accommodate a residential subdivision, 2) other adjoining landowners began development of their properties in approximately 1974, 3) all other adjacent landowners purchased their property for residential and commercial development, 4) all adjacent landowners were granted high-density zoning and were permitted to develop (this is inconsistent with the "otherwise permitted" allegation of paragraph 11 of the Complaint, Petition, ff) and 6) other adjacent landowners developed in accordance with their original investment-expectation. The record, of course, is devoid of any allegations concerning other landowners' "expectations."

The conclusory allegations of the Petitioner regarding the virtues of its proposed high-density development project were included in the Complaint, but Security now concedes that even under the present long-established zoning, it could build premium dwelling units at a rate of .2 units per acre. Also, with special exception, Security could build shops, camps, restaurants, offices and churches. (Petition, m). Stated more accurately, the entire 215 acre parcel may be developed presently and several possibilities are available to Security,

including, but not limited to, the option of pursuing cluster development as stated in the Petition.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. IN A "REGULATORY TAKING" CASE, BECAUSE OF THE PETITIONER'S CONTINUED ABILITY TO DEVELOP AND USE ITS HOLDINGS, THERE IS NO DEPRIVATION OF ALL OF ITS PROPERTY; THEREFORE, NO TAKING.

Security incorrectly asserts on page 10 of its Petition that this Court, for the first time in *Lucas v. South Carolina*, ___ U.S. ___, 112 S. Ct. 2886 (1992), used the term "all" in conjunction with the standard test for determining whether a regulation went "too far" in a Fifth Amendment takings context. Security is apparently unaware of this Court's use of the term "all" in the discussion of constitutional taking claims dating from, at least, *United States v. General Motors Corp.*, 323 U.S. 373 (1945), a physical taking claim.

General Motors, *supra*, dealt with the United States' taking temporary occupancy of a building under eminent domain. In that case, decided 47 years prior to *Lucas*, the Court found that a governmental action, short of acquisition of title or occupancy, but which deprives the owner of *all* or most of his interest in the subject matter, amounts to a taking within the meaning of the Fifth Amendment. *Id.*, 323 U.S. at 378. Obviously, Security is profoundly mistaken if it believes

this Court has not required all or most of the interests in a property to be destroyed before a constitutional taking claim is cognizable.

Shortly after *General Motors*, this Court decided *United States v. Causby*, 328 U.S. 256 (1946), which dealt with a taking claim involving low-flying government aircraft. Once again, in discussing whether compensation may be obtained under the Fifth Amendment for a "taking," the Court held that "If, by reason of the frequency and altitude of the flights, respondents could not use this land *for any purpose, their loss would be complete*" and in those circumstances, there would be a taking. *Id.*, at 261. However, this Court reversed a Court of Claims determination that a "taking" had, in fact, occurred. The terms "any purpose" and "complete' are synonymous with the "all" of *General Motors*.

General Motors and *Causby* were physical taking cases. In the field of regulatory takings, this Court has required total deprivation of all reasonable or economically viable use of the property. Indeed, *Agins v. Tiburon*, 447 U.S. 255 (1980), presented a factual and procedural scenario striking in similarity to this case.

The City of Tiburon adopted ordinances which placed Agins' land in a residential planned development and open space zone, which permitted the building of between one and five single-family residences on a five acre parcel. *Id.*, at 257. Unlike the facts alleged by Security, the Agins unequivocally had acquired their property prior to the adoption of the

zoning ordinance. The *Agins*' Court, in upholding the Supreme Court of California, flatly denied the landowner's claim of a taking without just compensation in violation of the Fifth Amendment. *Id.*, at 259.

Significantly, despite the contentions found in Security's third argument (Petition, pp. 16-20), this Court upheld the California appellate court's sustaining of a demurrer. The California practice, as discussed in *Agins*, in reviewing the grant of a general demurrer and dismissal of a complaint is parallel to Maryland's standard in reviewing the granting of a motion to dismiss as occurred in this case. The terms of the ordinance in Tiburon permitted the development of up to five residences on the Agins' five-acre tract. Although the ordinances limited development, they did not deny the owner economically viable use of his land and, therefore, the landowner's contention that "the city had completely destroyed the value of his property" was rejected and the finding that the complaint failed to state a cause of action was upheld. *Id.*, at 259 n.6.

The Court of Special Appeals of Maryland rejected Security's contention in paragraph 35 of its Complaint that it was denied the economically viable use of the property (Petition, mm) just as the California appellate court rejected a similar contention by Agins. In both cases, the complained of zoning ordinances permitted development but simply not the extremely high-density development demanded by both petitioners.

In *Lucas, supra*, this Court maintained the "all economically beneficial use" standard, while noting that perhaps a denial of 95% of the use, or almost 100%, may in *some* cases, qualify as a taking. *Id.*, 112 S. Ct. at 2895, n.8. This case does not even approach the standard dictated by *Lucas*.

As Security has conceded that it may develop the subject property with up to 43 dwelling units, and as the lower court determined that other additional uses may be permitted by variance and special exception, this claim, on its face, like that in *Agins*, cannot rise to the level of a Fifth Amendment taking. All, or nearly all, use of a property must be destroyed by regulation before a taking claim can survive.

In any event, a zoning district with a .2 unit per acre density standard, together with many other enumerated permitted uses, is clearly valid. The relevant zoning classification, Baltimore County Zoning Regulation 1A03.1 to 1A03.4 is included as an appendix hereto.

B. THE DECISION BELOW IS CONSISTENT WITH *NOLLAN, DOLAN, LUCAS* AND DECISIONS OF OTHER COURTS.

Security is apparently suggesting that the use of the term "all" in *Lucas* was gratuitous by Justice Scalia and did not truly reflect the appropriate standard in Fifth Amendment taking cases. However, not only has this Court referred to "all" or "destruction" of all economic use of property in the distant past as in *General Motors* and *Causby*, it has continued to apply

this standard in the most recent cases such as *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994). In *Dolan*, this Court cited *Agins, supra*, and stated that a land use regulation does not affect a taking ". . .if it does not deny an owner an economically viable use of his land." 114 S. Ct. at ____. Further clarifying this language in footnote six, the Court stated that permit conditions would not deprive the petitioner of "economically beneficial use," as the landowner would be able to derive *some* economic use for her property. *Id.*, 114 S. Ct. 2316 n.6. (emphasis in original). Obviously, "some" remaining economic use indicates that "all" has not been taken and thus, the *Lucas* standard, which was derived from decisions such as *Agins, supra*, applied to defeat the petitioner's claim.

Contrary to Security's suggestion, for a governmental action, whether it be through direct action or regulation, to effectuate a taking under the Fifth Amendment, such action must deny a landowner of all or most of his interest in the subject matter. This is the law and has been the law for decades.

What makes this case far less compelling than the authority cited by Security is that the factual scenario herein does not involve any exactions, the imposition of specific conditions for a permit (as in *Nollan v. California Costal Comm'n*, 483 U.S. 825 (1987) and *Dolan*) or the total removal of development rights (as in *Lucas*), but concerns the denial of a developer's request to an elected political body to exercise its discretion to change broad land use regulations which have

existed, at a minimum, for 20 years. This is *not* a case where the County attempted to impose heinous conditions in return for building permits or decreed measures which would destroy investment-backed development expectations at the eleventh hour. Put another way, Security is not in the position of defending itself against the imposition of new and unreasonable requirements, but instead is attempting to use the Takings Clause of the Constitution as a sword to achieve "up zoning" rather than protect against "down zoning."

Moreover, the majority in *Dolan* went out of its way to emphasize that the decision was not to affect the legitimacy of traditional comprehensive zoning ordinances. Clearly, the establishment of a zoning district for watershed protection is a proper exercise of the County's police power. There is no dispute that this involves a legitimate public purpose, and that the means are reasonably related to the purpose.

From the beginning of this Court's review of the power of government in the field of zoning regulations, in *Euclid v. Ambler Co.*, 272 U.S. 365 (1926), it has been established that zoning laws are facially constitutional despite alleged diminution in value of landowner's property. The use of the County's police power to protect its residents, by zoning regulation, from the effects of high density development, particularly in a situation where the property is so close to a watershed, has been recognized as legitimate. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The County adopts the rationale of the Court of Special Appeals of Maryland as found in the Petition, pages r-t in this regard. The County submits that not only did the court below fully consider and correctly decide the takings claim and that prior decisions of this Court, cited *supra*, are controlling, but it is also significant that no conflict in interpretation is alleged by Security. In fact, several state courts have construed *Lucas*, *Nollan* and *Dolan*, and then "all or substantially all" standard, exactly as the lower court below.

Taylor v. Village of North Palm Beach, 659 So. 2d 1167 (Fla. App. 4th Dist. 1995); *Long Cove Club v. Hilton Head Island*, 458 S.E.2d 757 (S.C. 1995); *Peterman v. State Dept. of Natural Resources*, 521 N.W.2d 499 (Mich. 1994); *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994); *S.E. Cass Water Res. v. Burlington*, 527 N.W.2d 884 (N.D. 1995); *Reale Investment v. City of Colorado Springs*, 856 P.2d 91 (Colo. 1993).

The consistency with which the lower courts have followed the "all or substantially all" precedents of this Court further justifies the denial of Security's Petition. Indeed, the decision below turns upon its own facts and security's sparsely worded Complaint, and any further review would only affect and possibly benefit the single investment entity seeking the issuance of the writ.

The "all or substantially all" standard for Fifth Amendment takings represents settled law in this area. This Court has been consistent in its application. Moreover, there is

no suggestion that the lower courts have been anything but consistent in applying the proper standard.

The third argument presented by Security (Petition, pp. 16-20) urging the granting of the writ is so disingenuous that it should be summarily rejected. This argument highlights Security's total misunderstanding of takings jurisprudence.

Petitioner suggests that the "rough proportionality" test set forth in *Dolan*, *supra*, would apply to this case, and the County would be required to show a reasonable relationship between the government's admitted legitimate interests and the complained of zoning. This is simply incorrect. Perhaps Security missed footnote 8 of that opinion. *Id.*, 114 S. Ct. at 2320 n.8. There, Chief Justice Rehnquist concurred with Justice Stevens' dissent stating that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Under *Dolan*, the County does not shoulder the burden of justifying its comprehensive zoning ordinance.

The burden shifted to the local government in *Dolan*, per Chief Justice Rehnquist, because the city made an adjudicative decision on a building permit application for an individual parcel. *Id.*, 114 S. Ct. at 2320 n.8. The instant matter is obviously dissimilar to *Dolan*, as well as *Nollan*, in that Security is not challenging an adjudicative permit decision (i.e. an "unconstitutional condition case"), but instead suggests

that the County must satisfy a burden of "rough proportionality" whenever a disappointed property owner disputes the application of general zoning regulations to a particular parcel. The adoption of such a standard would render comprehensive zoning impossible, as municipalities would be required to justify every application of zoning to each property owner if challenged. Under *Dolan*, the burden remained with Security and the Complaint, on its face, failed to allege a constitutional taking.

The facts alleged in the Petition to this Court are simply not consistent with those which were contained in the Complaint passed upon at the trial court level. To paraphrase the holding of the Court of Special Appeals of Maryland, Security does not have the constitutional right to have its property rezoned in order to develop it as it wishes. (Petition, o).

CONCLUSION

The Court of Special Appeals of Maryland correctly followed the holdings of this Court and properly denied Security's not-so-subtle attempt to intimidate the County Council for Baltimore County into agreeing to its re-zoning demands. Only one entity (Security) could possibly benefit from any further review of this matter. Security has failed to show conflict among the courts or any other compelling justification for the issuance of a writ of certiorari.

Respectfully submitted,

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APPENDIX

Section 1AO3--R.C. (WATERSHED PROTECTION) ZONES [Bill No. 98, 1975; No.178, 1979.]

1A03.1--Findings and Legislative Policy. [Bill No. 98, 1975;178, 1979.]

The county council finds that major, high-quality sources of water supply for the entire Baltimore metropolitan area and for other neighboring jurisdictions lie within Baltimore County and that continuing development in the critical watersheds of those water-supply sources is causing increased pollution and sedimentation in the impoundments, resulting in increasing water-treatment costs and decreasing water-storage capacity. The R.C.4 zoning classification and its regulations are established to provide for the protection of the water supplies of metropolitan Baltimore and neighboring jurisdictions by preventing contamination through unsuitable types or levels of development in their watersheds. [Bill No. 98, 1975; No. 178, 1979.]

1A03.2--Rezoning by petition. [Bill No. 98, 1975; No, 178, 1979.]

No petition for reclassification of property in an R.C. 4 zone may be granted unless a registered professional engineer, architect, landscape architect, or land surveyor first certifies: [Bill No. 98, 1975; No. 178, 1979.]

1. that the parcel of land under petition lies at least 200 feet

from the property line of any public water reservoir; [Bill No. 178, 1979.]

2. that the parcel lies at least 300 feet from any 1st or 2nd order or greater stream that flows directly into a public water reservoir; [Bill No. 178, 1979.]
3. that the parcel lies at least 300 feet from any 3rd order or greater stream that flows directly or indirectly into a public water reservoir; [Bill No. 178, 1979.]
4. that no more than 30% of the parcel has a slope of more than 20%; [Bill No. 178, 1979.]
5. that the parcel does not lie within a 100-year floodplain; and [Bill No. 178, 1979.]
6. that, as shown by an environmental impact statement, the manner in which proposed reclassification will affect water quality in the watershed or any public water reservoir. [Bill No. 178, 1979.]

For the purpose of this subsection, streams are classified by order as shown on the map of stream orders adopted by the Planning Board on March 25, 1976. [Bill No. 178, 1979.]

1A03.3--Use Regulations. [Bill No. 98, 1975.]

A. Uses permitted as of right, The following uses, only are permitted as of right in R.C. 4 zones: [Bill No. 98, 1975.]
    1. Dwellings, one-family detached. [Bill No. 98, 1975.]
    2. Farms and limited-acreage wholesale flower farms

(see Section 404). [Bills No. 98, 1975; No. 51, 1993.]

3. Open space, common. [Bill No. 98, 1975.]

3a. Public schools. [Bill No. 63, 1980; No. 47, 1982; Bill No. 47, 1985.]

4. Telephone, telegraph, electrical-power, or other similar lines or cables-all underground; underground gas, water, or sewer mains or storm drains; other underground conduits except underground interstate and intercontinental pipe lines. [Bill No. 98, 1975.]

5. Trailers, provided that any trailer allowed under this provision must be used or stored in accordance with the provisions of Paragraphs b, c, e, or f of Subsection 415.1 and Subsection 415.2A.1, as applicable. [Bill No. 98, 1975.]

5a. Antennas used by CATV systems operated by companies franchised under Title 2, Article VI, Division 2 of the Baltimore County Code 1978, if situated on property owned by the county, state or federal government or by a governmental agency. [Bill No. 220, 1981.]

5b. Transit facilities. [Bill No. 91, 1990.]

6. Accessory uses or structures, including, but not limited to the following: [Bill No. 98, 1975.]

   a. Excavations, uncontrolled. [Bill No. 98, 1975.]

b. Farmer's roadside stand and produce stand, subject to the provisions of Section 404.4. [Bill No. 98, 1975; Bill No. 41, 1992.]

c. Home occupations. [Bill No. 98, 1975.]

d. Offices or studios of physicians, dentists, lawyers, architects, engineers, artists, musicians, or other professional persons, provided that any such office or studio is established within the same building as that serving as the professional person's primary residence; does not occupy more than 25 per cent of the total floor area of that residence; and does not involve the employment of more than one non-resident employee. [Bills No. 98, 1975; No. 105, 1982.]

e. Parking spaces, including recreational vehicles (subject to the provisions of Section 415A). [Bill No. 98, 1975.]

f. Swimming pools, tennis courts, garages, utility sheds, satellite receiving dishes (subject to Section 429), or other accessory structures or uses (subject to the height and area provisions for buildings as set forth in Section 400). [Bill No. 98, 1975; Bill No. 71, 1987.]

7. Commercial film production, subject to Section 435. [Bill No. 57, 1990.]

B. Uses permitted by special exception. The following uses,

only, are permitted by special exception in R.C. 4 zones: [Bill No. 98, 1975.]

1. Antique shops (subject to the provisions of Section 402B). [Bill No. 98, 1975.]
2. Camps, including day camps. [Bill No. 98, 1975.]
3. Community buildings, swimming pools, or other uses of a civic, social, recreational, or educational nature, including picnic grounds and tennis facilities, provided that no tennis facility shall comprise more than 4 courts (see Section 406A). [Bill No. 98, 1975; No. 62, 1978.]

3a. Churches and other buildings for religious worship. [Bill No. 45, 1982.]

4. Dwellings or other buildings converted to tea rooms or restaurants, as provided in Subsection 402.3. [Bill No. 98, 1975.]
5. Excavations, controlled (subject to the provisions of Section 403) except removal of top soil from the site is expressly prohibited. [Bill No. 98, 1975.]
6. Fish hatcheries. [Bill No. 98, 1975.]
7. Golf courses, country clubs, or other outdoor recreation clubs, and game preserves. [Bill No. 98, 1975.]

7a. Home occupations of disabled persons, where the use is established in a structure originally constructed as a dwelling or as accessory to a dwelling or where the use is established in a

structure that is situated on the same lot as a dwelling, and which the zoning commissioner finds to be compatible with its surrounding neighborhood; provided that:

(1) only three persons including the disabled person and the members of his immediate family who are residents of the dwelling are employed in the use on the premises; and

(2) in any case the use is conducted by a disabled person whose domicile is the dwelling to which the use is accessory and whom the hearing authority finds is so severely disabled as to be unable to engage in his occupation away from the premises of his home.

Any provision of subsection 502.2 to the contrary notwithstanding, any special exception granted pursuant to this item shall expire upon the first to occur of the following:

(1) five years after the issuance of the permit;

(2) the death of a disabled person;

(3) the termination of the disability; or

(4) the failure of the disabled person to permanently reside at the premises.

A new special exception for the use may be granted when the previous special exception expires but only upon the completion of the entire application and hearing process in the same manner as if it were

the initial application for this special exception. It is the purpose of this provision to prevent the use of residential property for business purposes by an occupant other than a disabled person and to ensure that any occupation permitted pursuant to this item will be conducted in a manner appropriate to its surroundings. [Bill No. 27, 1981.]

7b. Horticultural nurseries, subject to the provisions of Section 404.1 and 404.2. [Bill No, 41, 1992.]

7c. Landscape service operations, subject to provisions of Section 404.1 and 404.3 [Bill No. 41, 1992.]

7d. Offices or studios of physicians, dentists, lawyers, architects, engineers, artists, musicians, or other professional persons as an accessory use, provided that any such office or studio is established within the same building as that serving as the professional person's primary -residence; does not occupy more than 25 per cent of the total floor area of that residence; a